U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: February 11, 1998

CASE NO. 96-INA-369

In the Matter of:

MURIEL HOROWITZ,
Employer,

on behalf of

MALGORZATA JARZYCKA,
Alien.

Before: Burke, Lawson and Vittone
Administrative Law Judges

JOHN M. VITTTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

This matter concerns an application (ETA 750A) seeking the permanent employment of the Alien as a live out Cook (AF 17-18). The Employer specified in the ETA 750A that any applicant for the position would need a high school education and two years experience in the job offered. The application and an accompanying qualification statement showed that both the Employer and Alien had appointed Tadeusz Kucharski as their agent.

Seven applicants were referred to the Employer by the State job service. These included

Florie Nikaj. In a recruitment report filed by the Employer it was indicated that Ms. Nikaj had been rejected for the position for the following reason:

> Ms. Nikaj came for an interview on 03/08/95.
> She came to the United States 3, 5 (sic) years ago and she applied for political asylum, but her application is still pending. She is not a U.S. worker.

(AF 59).

In a questionnaire completed by Ms. Nikaj for the job service, she reported that she had been interviewed for the position by Jadeusz Kucharski (AF 55-56). She reported also that she was legally permitted to accept any full time job in the United States.

The CO issued a Notice of Findings (AF 65-70) in which she proposed to deny the application on grounds which included violation of § 656.21(b)(2) for the following reason:

> Employer indicates that the job opportunity is for a Domestic 'Cook' and requires a high school education in Item 14, ETA Form 750A. A high school education is not required for this occupation; please delete four years of high school so that eight years of grade school is the requirement.

(AF 68).

The Employer was informed that in the absence of deleting the high school education requirement a "business necessity" for the same would have to be established.

Other grounds assigned by the CO included violation of §§ 656.24(b)(2)(ii), 656.21(b)(6), 656.20(c)(8) and 656.20 (b)(3)(ii) for the following reasons:

> Employer states that Ms. **Florie Nikaj** 'came for an interview on 03/08/95' and was found not to be a U.S. worker. Ms Nikaj was reached by mail and responded to post recruitment follow-up stating that she was interviewed by 'Tadeusz Kucharski', who is the agent representing both the employer and alien in this Application. Ms. Nikaj states that she is qualified for the job and that she is authorized to work in the United States.
>
> We note that this is not the first time that a U.S. worker has alleged to have been interviewed by this agent for job opportunities/employers represented by this agent/agency in Alien Labor Certification matters. Furthermore, we note that agent's name (and correct spelling of the name) would not be known to Ms. Nikaj unless she was not, in fact, interviewed by the agent. Based on these facts it does not appear that the employer had any active involvement in the recruitment process, nor that she conducted a good faith recruitment effort.

(AF 66).

The Employer was requested to respond by establishing that she was involved in the recruitment process and that Mr. Kucharski normally considers and interviews on behalf of the employer, applicants for the job opportunity offered the alien but which do not involve labor certification. The Employer was also directed to show that "this U.S. worker" was not qualified for the position by education, training, experience or a combination thereof.

The Employer's rebuttal to the NOF (AF 71-80) sets forth reasons for requiring a high school education including the following:

> The cook has to prepare complicated dishes of French, American, Jewish kosher couisines (sic) know the intricacies of the meals prepared must know the principles of preparation of food for diabetic and stomach ulcer conditions.

AF 79).

The rebuttal states further, in pertinent part:

> Florije Nikaj
>
> Section 656.21(b)(6) and 656.20(c)(8) does not apply to this case because this applicant is not a U.S. worker.
>
> Resume of this applicant should not have been sent to me at all, because I am required to seriously consider any qualified U.S. worker but not required to interview or recruit persons who are not U.S. workers. In spite of that I personally interviewed Ms. Nikaj on March 8,95.
>
> During the interview I asked her whether she had a Green Card and she said no. Ms. Nikaj informed me that she applied for political asylum, which was not granted yet. She showed me her Employment Authorization Card she obtained from INS/copy enclosed/.
>
> I am not familiar with such cases so I called the INS office in New York to find out what is immigration status of this applicant. I was informed that Ms. Nikaj has not been granted Green Card, is not a U.S. resident. She did not apply for permanent resident status yet because her case is pending. Therefore Ms. Nikaj is neither U.S. resident or is likely to become one soon.
>
> I informed the U.S. Department of Labor that Ms. Nikaj is not a U.S. worker.
>
> Judging from how easy it was for me to obtain a/m (sic) information from the INS

> I assumed that it would be even easier for the Labor Department to get confirmation of my information at the INS office.
>
> I thought it would be the end of it, instead local office sought confirmation of information from the applicant and not the INS.
>
> In my opinion, the resume of this applicant should not have been sent to me in the first place. Ms. Nikaj is not a U.S. worker, therefore for the purpose of this procedure she is not qualified to be considered.
>
> Whether she has Employment Authorization or not does not change her status in any way.
>
> Still I spent my time interviewing her and getting information about her status personally. My agent did not help me in any way in recruitment process in this case.
>
> I interviewed Ms. Nikaj so any 'chilling effect' did not take place.
>
> I have no idea where did Ms. Nikaj get my Agent's name. Mr. Kucharski did not know either I thought may be she got his name from prior other cases, you mentioned in your Notice of Findings.
>
> My agent informed me that he did not think so because did his best to avoid appearances of his involvement in this recruitment process of the employers for a long time already.
>
> I do not know about other cases but in this case I conducted interviews and did all contacts with the applicants, myself, including Ms. Nikaj who should not have been listed as an applicant because she is not a U.S. worker.

(AF 77-79).

Attached to the Employer's rebuttal was a copy of a picture identification card, entitled "Employment Authorization", issued to Florije Nikaj on 12/21/94 under provision of law, 274a.12(c)(8). (AF 76).

The CO issued a Final Determination denying certification for the three grounds stated above (AF 81-85). In regard to the high school education issue, the CO found that the Employer had not established a "business necessity" for the requirement because a Domestic Cook by the very virtue of his/her experience is qualified to know the intricacies of his/her job and the possession of a high school education is not required to "better prepare the cook to successfully perform the job duties." Concerning the "U.S. worker" issue, the CO concluded that Employer

presents "no evidence" to support his position that Ms. Nikaj is not a U.S. citizen or permanent resident. Finally, the CO again noted that the "**fact**" that the agent of the Employer and Alien in the instant case has been repeatedly charged to have been involved in recruitment efforts in other applications processed through her office and found:

> The weight of the available evidence does not support a good faith recruitment effort of U.S. workers. Although we do not wish to impugn the truthfulness of the employer's recruitment report or rebuttal, neither can we automatically attach less value to the integrity of this U.S. worker whose statement very specifically names the agent and would have no way of knowing his name unless she was, in fact, interviewed by him.

(AF 81).

The Employer requested a reconsideration of the Final Determination which was denied by the CO. The Employer again requested a review of the determination and the record was forwarded to the Board for such purpose.

DISCUSSION

I. High School Education Requirement

Section 656.21(b)(2) of the regulations provides, in pertinent part:

> The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
> (I) The job opportunity's requirements, unless adequately documented as arising from business necessity:
> (A) Shall be those normally required for the job in the United States;
> (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs:
>
> ...

Pursuant to §656.25(c), if a CO does not grant certification, the CO must issue a NOF stating the specific grounds for issuing the same. The Board has held that the NOF must give notice which is adequate to provide the Employer the opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). The NOF must specify what the employer must show to rebut or cure the CO's findings; otherwise the employer is deprived of full opportunity to rebut. *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989).

In *Sidhu Assoc., Inc.*, 95-INA-182 (Jan. 2, 1997), the Board noted that when a CO proposes to deny certification on the basis that an educational requirement is restrictive because it is not normally required for the job in the United States, the employer must be given the

opportunity to establish either that it is normal to the occupation or that there is a business necessity for the same.

In the instant matter, the CO did not give Employer the opportunity to establish that its educational requirements were normal for the position or that it arose from a business necessity. Rather, the CO stated "[a] high school education is not required for this occupation; please delete four years of high school so that eight years of grade school is the requirement." (AF 68). Accordingly, a remand will be necessary to correct this denial of due process.

II. U.S. Worker

Section 656.24 (b)(2)(ii) provides:

> The Certifying Officer shall consider a **U.S. worker** able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the job as customarily performed by U.S. workers similarly employed . . .

(**emphasis added**).

Pursuant to §656.21(b)(6) "U.S. workers" who apply for the job opportunity may be rejected solely for job-related reasons and §656.20 (c)(8) requires that the job opportunity be clearly open to any qualified "U.S. worker."

A *United States worker* is defined in §656.3 as "any worker who is a United States citizen; is a U.S. national; is lawfully admitted for permanent residence under 8 U.S.C. 1160(a), 1161(a) or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158."

The CO has maintained that the Employer has produced no evidence to establish that applicant Nikaj is not a U.S. worker. To the contrary, the Employer has documented that this applicant does not meet the regulatory definition of a U.S. worker for labor certification purposes.

The "Employment Authorization" card submitted by the Employer with the rebuttal makes reference to Ms. Nikaj's being permitted to work pursuant to the provisions of 274a.12(c)(8). This is a citation to the Immigration and Naturalization Service's (INS) regulations found in Title 8 CFR Part 274a entitled Control of Employment of Aliens. Subsection (c) of the regulation, 8 CFR §247a (c), provides, in pertinent part:

> (c) Aliens who must apply for employment authorization. An alien within a class of aliens described in this section must apply for work authorization. If authorized, such alien may accept employment subject to any restrictions stated in the regulations or cited on the

> employment authorization document:
>
> * * *
>
> (8) An alien who has filed a complete application for asylum or withholding of deportation or removal...whose application...
>
> (I) Has not been decided, and who is eligible to apply for employment under §208.7 of this chapter because the 150-day period set forth in that section has expired . . . or
>
> (ii) Has been recommended for approval, but who has not yet received a grant of asylum...

Thus, it is clear that although Ms. Nikaj may be permitted by INS to work, such permission has not been based on the **grant** of asylum needed to qualify her as a U.S. worker under Department of Labor regulations. Consequently, her rejection for the position did not violate the provisions of any of the regulations cited by the CO, all of which relate to the rejection of "U.S. workers."

III. Agent's Participation in Interview

Section 656.20(b)(3) provides that as it is contrary to the best interest of U.S. workers to have the alien and/or agents for the alien participate in interviewing or considering U.S. workers for the job offered the alien, the alien's agent may not interview or consider U.S. workers unless he or she is the employer's representative who routinely participates in interviewing candidates for the employer for positions not involving labor certification.

As the regulation prohibits an agent's participation only in the interview of U.S. workers, and as Ms. Nijak does not qualify as a U.S. worker, it follows that the application can not be denied on the basis of any participation by the agent even if we would agree with the CO's finding that the alien's agent did interview Ms. Nijak.

ORDER

The Certifying Officer's denial of labor certification is hereby VACATED and this case is REMANDED for a supplemental NOF outlining all methods by which the Employer may establish that his requirement for a high school education is not unduly restrictive.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.